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**JUN 17 1994**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

June 17, 1994

**HAND DELIVER**

William F. Caton  
Acting Secretary  
Federal Communications Commission  
Washington, D.C. 20554

ATTN: Chief, Allocations Branch, Policy and Rules Division

RE: Petition for Rule Making (Channel 288A, Malabar, Florida)


Dear Mr. Caton:

Transmitted herewith on behalf of Jupiter Radio Partners, permittee of FM Channel 288A, Jupiter, Florida, is an original and four copies of is " Motion to Dismiss or Defer Processing of Rule Making Petition" filed in connection with the above-referenced Petition For Rule Making filed by Jimmy H. Horne, Jr. on June 3, 1994.

Should any questions arise concerning this matter, kindly contact the undersigned directly.

Respectfully submitted,

**MAY & DUNNE, CHARTERED**

By:   
Joseph E. Dunne III  
Attorney For Jupiter Radio  
Partners

JED:A32

xc: All Per Attached Certificate of Service  
Patricia S. Fierro  
Gary S. Smithwick, Esq.  
Stephen D. Gavin, Esq.  
Howard Topel, Esq.

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

**RECEIVED**  
**JUN 17 1994**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Amendment of Section 73.202(b) ) RM-  
Table of Allotments )  
FM Broadcast Stations )  
(Malabar, Florida) )  
 )

To: Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

**MOTION TO DISMISS OR DEFER PROCESSING OF RULE MAKING PETITION**

Jupiter Radio Partners ("Partners"), by its undersigned attorney and pursuant to Section 1.45 of the Commission's Rules and Regulations, 47 C.F.R. § 1.45 (1993), hereby respectfully requests that the Commission dismiss or defer processing on the above-captioned rule making petition ("Petition") filed by Jimmy H. Horne, Jr. ("Horne") on June 3, 1994. As grounds for this Motion, Partners shows and states as follows.

1. Partners is the permittee of channel 288A, Jupiter, Florida. Its application was granted by Judge Chachkin in his Memorandum Opinion and Order, FCC 94M-229 (released April 25, 1994), which ended a contested hearing proceeding and which granted Partners' application. Partners filed an application to modify its construction permit to specify channel 288C3 (Hereinafter "Upgrade Application") on May 6, 1994, and the Upgrade Application was "accepted for filing" by the Commission on May 31, 1994. See,

Public Notice, Report No. 15816, p. 6.<sup>1</sup>

2. Partners' Upgrade Application, specifying channel 288C3 in Jupiter, Florida, is mutually exclusive with Horne's Petition to add channel 288A to Malibar, Florida. Horne's Petition admits as much in paragraph 4.

3. The precedence to be followed in this instance, when a conflicting petition for rule making is filed subsequent to the filing of an FM minor change application, is clear:

In essence, FM applications will become protected from rule making petitions at the same time they gain protection from other mutually exclusive applications--that FM applications for new stations or major changes during a filing window will be protected from rule making petitions at the close of the filing window. All other FM applications will be protected as of the date they are received at the Commission. (Emphasis added) FM Applications (Cut-Off Rules), 7 FCC Rcd 4917, 70 Rad.Reg.2d (P&F) 1641, 1642 (1992).

Upgrade or "one-step" applications, as is Partners' application, is a minor change application and is protected as of the date it is received by the Commission. Report and Order in MM Docket No. 92-159 (FM Channel and Class Modifications) 8 FCC Rcd 4735, 73 Rad.Reg.2d (P&F) 247, 251 (1993).

4. In this instance, Partners' application not only had been received by the Commission, it was accepted for filing four days prior to the filing of Horne's Petition. Accordingly, Horne's Petition should be dismissed, or processing deferred pending action on Partners' application.

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<sup>1</sup> The Public Notice erroneously identifies the applicant as "Jupiter Radio Broadcasting, Inc.," Partners' predecessor in interest. The Commission was made aware of the error in a letter dated June 10, 1994.

**WHEREFORE**, the foregoing premises considered, Jupiter Radio Partners respectfully request the dismissal or deferral of processing of the above-referenced Petition for Rule Making filed by Jimmy H. Horne, Jr. on June 3, 1994.

Respectfully Submitted,

**JUPITER RADIO PARTNERS**

By: 

Joseph E. Dunne III  
its Attorney

**MAY & DUNNE, CHARTERED**  
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Suite 520  
Washington, D.C. 20007  
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**CERTIFICATE OF SERVICE**

I, Brian R. Claydon, a law clerk in the offices of May & Dunne, Chartered, hereby certify that I have this 17th day of June, 1994, sent the foregoing MOTION TO DISMISS OR DEFER PROCESSING OF RULE MAKING PETITION first class U.S. mail, postage prepaid, to the following:

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Brian R. Claydon